

1 Tell her by your verdict that you believe
2 her. Tell him by your verdict that you know what
3 he did to her from 1997 to 2000 here in New York.
4 Tell him by your verdict that you know that he put
5 his penis in Ashley Martinez's vagina when she was
6 12 years old because there was no reason for her to
7 make this up. Tell him by your verdict that you
8 know that this happened here in Queens county
9 ladies and gentlemen and you are not going to let
10 him get away with it.

11 MR. JOHNSTON: I am going to be object to
12 that judge.

13 THE COURT: Sustained.

14 MS. MALIK: I am going to ask each and
15 every one of you ladies and gentlemen of the jury
16 to return the only just and the only right and the
17 only correct verdict for this case and that is a
18 verdict of guilty. Thank you.

19 THE COURT: Members of the jury we now
20 come to the point in the trial where I instruct you
21 on the law and you will retire for your
22 deliberations with a view towards reaching a
23 verdict.

24 We are here to assure that a just and
25 fair result be reached in this case without regard

1 to sympathy prejudice or passion. The process by
2 which you are to evaluate the evidence is first to
3 determine the facts and second to apply the
4 applicable law as I outline it for you in my
5 charge. And when all of you have agreed that will
6 be your verdict and you will report it to the
7 court.

8 In our system of justice you and I have
9 separate roles. You are the sole and exclusive
10 judge of the facts. And I am the sole judge of the
11 law. The court has no opinion as to the guilt or
12 non guilt of the defendant. That is your function.
13 You must determine from all the evidence before you
14 whether or not the defendant is guilty or not
15 guilty of the charges that I submit to you.

16 Any reference that I may make to the
17 facts in my charge is not intended to interfere
18 with your recollection of the facts. Your
19 recollection of the facts must provide -- you must
20 determine from all the evidence and the sworn
21 testimony that you heard from the witness stand and
22 the exhibits that were accepted into evidence what
23 the facts are.

24 On the other hand you must accept the law
25 as I give it to you whether you agree with it or

1 not. You may not substitute what you think the law
2 should be. My function during the course of the
3 trial is to see that the case is properly
4 conducted. It is my responsibility to see that the
5 rules of evidence are observed.

6 During the course of the trial it's been
7 necessary for me to rule on the admission of
8 evidence and on motions made with respect to
9 applicable law. You must not infer from any such
10 ruling that I have made or anything that I have
11 said during the course of the trial that I hold any
12 views as to the guilt or non guilt of the
13 defendant.

14 During the trial I have sustained
15 objections to questions that were asked and I --
16 without permitting the witness to answer or where
17 an answer was made I instructed that the answer be
18 stricken and that you dismiss it from your minds.
19 And answers that had been stricken from the record
20 are no longer part of the evidence in the case.

21 I charge you that you must not draw any
22 inference from any unanswered question or any
23 testimony that has been stricken from the record
24 and which you were instructed to disregard.

25 An indictment is not evidence. I charge

1 you that the bringing of an indictment by a Grand
2 Jury does not in any way either prove or tend to
3 prove the guilt of the defendant. An indictment
4 cannot be considered by you as proof whatsoever of
5 the defendants guilt or any factor to prove his
6 guilt.

7 The indictment is only an accusation.
8 It's a charge of criminal activity against the
9 defendant brought by a Grand Jury and only serves
10 as a mechanism for bringing the defendant to trial.

11 We now come down to the fundamental
12 principles of our law that apply in all criminal
13 trials. The presumption of innocence. The burden
14 of proof and the requirement of proof beyond a
15 reasonable doubt.

16 Throughout these proceedings the
17 defendant is presumed to be innocent. As a result
18 you have must find the defendant not guilty unless
19 on the evidence presented at this trial you
20 conclude that the People have proven the defendants
21 guilt beyond a reasonable doubt.

22 In determining whether the People have
23 satisfied their burden of proving the defendant
24 guilty beyond a reasonable doubt you may consider
25 all of the evidence presented whether by the People

1 or by the defendant. In doing so however remember
2 that even though the defendant introduced evidence
3 the burden of proof remains on the People. The
4 defendant is not required to prove that he is not
5 guilty.

6 In fact the defendant is not required to
7 prove or disprove anything. To the contrary the
8 People have the burden of proving the defendant
9 guilty beyond a reasonable doubt. That means
10 before you can find the defendant guilty of a crime
11 the People must prove beyond a reasonable doubt
12 every element of the crime including that the
13 defendant is a person who committed that crime.

14 The burden of proof never shifts from the
15 People to the defendant. If the People fail to
16 satisfy their burden of proof you must find the
17 defendant not guilty. If the People satisfy their
18 burden of proof you must find the defendant guilty.

19 What does our law mean when it requires
20 prove of guilty beyond a reasonable doubt. The law
21 using the term proof beyond a reasonable doubt to
22 tell you how convincing the evidence of guilt must
23 be to permit a verdict of guilty.

24 The law recognizes that in dealing with
25 human affairs there are very few things in the

1 world that we know with absolute certainty.

2 Therefore, the law does not require the People to
3 prove the defendant guilty beyond all doubt.

4 On the other hand it's not sufficient to
5 prove that the defendant is probably guilty. In a
6 criminal case the proof of guilt must be stronger
7 than that. It must be beyond a reasonable doubt.
8 A reasonable doubt is an honest doubt of the
9 defendants guilt for which a reason exists based
10 upon the nature and the quality of the evidence.

11 It is an actual doubt and not an
12 imaginary doubt. It is a doubt that a reasonable
13 person acting in a matter of this importance would
14 be likely to entertain because of the evidence that
15 was presented or because of the lack of convincing
16 evidence. Proof of guilty beyond a reasonable
17 doubt is proof that leaves you so firmly convinced
18 of the defendants guilt that you have no reasonable
19 doubt of the existence of and of any element of the
20 crime or of the defendants identity as the person
21 who committed that crime.

22 In determining whether or not the People
23 have proven the defendants guilt beyond a
24 reasonable doubt you should be guided by a full,
25 fair, evaluation of the evidence. After carefully

1 evaluating that evidence each of you must decide
2 whether or not that evidence convinces you beyond a
3 reasonable doubt of the defendants guilty.

4 Whatever your verdict may be it must
5 not rest upon baseless speculation nor may it be
6 guided in any way by bias, prejudice, sympathy or
7 by a desire to put an end to your deliberations or
8 to avoid an unpleasant duty.

9 If you are not convinced beyond a
10 reasonable doubt that the defendant is guilty of a
11 charged crime you must find the defendant not
12 guilty of that crime. If you are convinced beyond
13 a reasonable doubt that the defendant is guilty of
14 a charged crime you must find the defendant guilty
15 of that crime.

16 I have used the word evidence many times.
17 What is evidence. Evidence consists of sworn
18 testimony relayed both on direct and cross
19 examination. Also exhibits the court permitted to
20 be received and marked into evidence. That is all
21 the evidence that there is in this case. And it is
22 only on this evidence that you are to make your
23 final determination of the facts.

24 Questions in and of themselves are not
25 evidence. Therefore, you cannot infer any fact from

1 the mere asking of a question. It is the answer
2 coupled with the question that constitutes
3 evidence. Using an example that I used earlier if
4 a witness were asked a question do you own a car
5 and the witness answered no you may not infer from
6 the mere asking of that question that a witness
7 owned the car.

8 From time to time I did ask some
9 questions. I did so only because I put myself in
10 your shoes. I asked these questions to try and
11 assist you. You are to consider the answers given
12 to my questions in the same manner that you will
13 consider all answers given to all questions asked
14 during the course of the trial. You are not to
15 attach any greater weight because I asked a
16 question.

17 Items that I have excluded from your
18 consideration were excluded because they were not
19 legally admissible. The law does not require you to
20 accept all the evidence that I have admitted. It
21 is your job to determine what evidence you will
22 accept. Each of you must make your own evaluation
23 of the testimony given by the witnesses. You are
24 the judges of the facts. You will determine the
25 degree or weight that you choose to give to a

1 witnesses testimony. These rules apply to all
2 witnesses including police officers. Their
3 testimony does not deserve any greater or lesser
4 believability simply because of their official
5 status.

6 There is no magical formula by which you
7 are to evaluate testimony. You are to employ your
8 experience in life and your own every day common
9 sense that you are called upon to determine the
10 reliability or unreliability of statements made to
11 you by others. Those tests that you use in your
12 every day lives in sizing up people and in deciding
13 whether or not they are telling the truth are the
14 same tests that you will apply in your
15 deliberations in this case.

16 You may consider that the testimony of
17 any witness may fail to conform to the facts as
18 they occurred because the witness is intentionally
19 telling a falsehood or because the witness did not
20 accurately see or hear about which the witness is
21 testifying to or the recollection of facts are
22 faulty or because the witness or witnesses have not
23 expressed themselves clearly in giving their
24 testimony in the courtroom.

25 Also the interest or lack of interest of

1 any witness in the outcome of this case or the bias
2 of any witness should there be any. You may also
3 consider the age, the appearance, the manner in
4 which a witness or witnesses gave that testimony
5 from the witness stand. And you may consider the
6 probability or improbability of the witnesses
7 testimony when viewed in light of all the other
8 evidence in the case.

9 If it appears that there is a discrepancy
10 in the testimony -- I am sorry, a discrepancy in
11 the evidence consider whether or not the apparent
12 discrepancy may be reconciled by fitting the two
13 stories together. If that is not possible then you
14 will have to determine which of the conflicting
15 versions you will accept.

16 If you find that any witness has
17 willfully testified falsely as to any material fact
18 you may disregard the entire testimony of that
19 witness or you may if you wish give credit to so
20 much of the testimony that you find supported by
21 other credible testimony. You may accept all of
22 such witnesses testimony, accept that which you
23 have found he or she testified truthfully to or
24 none of it or part of it that is for you to
25 determine.

1 You have heard the testimony about the
2 prosecutor or defense counsel or investigator
3 speaking to a witness about the case before the
4 witness testified at this trial. The law does not
5 prohibit a prosecutor or a defense attorney or
6 investigator from speaking to a witness about a
7 case before the witness testifies.

8 Nor does it prohibit the prosecutor or
9 the defense attorney or investigator from reviewing
10 with witnesses the questions that will be asked at
11 trial. You may have also heard the testimony that
12 a witness read certain material pertaining to this
13 case before the witness testified at trial. The
14 law does not prohibit a witness from doing so.

15 Sometimes a witness will be asked a
16 question and then answer that he or she cannot
17 remember what is being asked for. But that he or
18 she may be able to refresh his or her recollection,
19 memory if given an opportunity to examine something
20 usually a document. The witness may then be given
21 the document and permitted to read it silently to
22 him or herself.

23 If that document refreshes the witnesses
24 recollection and again memory the witness will then
25 answer. The question and the answer is evidence.

1 The document that was used to refresh the witnesses
2 recollection may or may be marked for
3 identification. In most instances that document
4 will not be received in evidence. And thus that
5 document is not available for your inspection or
6 consideration. But the question with the answer
7 that the witness gave will be evidence for your
8 consideration.

9 Although not required to do so the
10 defendant in this case testified on his own behalf.
11 His testimony should be considered by you as you
12 would the testimony of any other witness. The
13 defendant is of course an interested witness.
14 Interested in the outcome of this trial. You may as
15 jurors wish to keep such interest in mind in
16 determining the weight and the credibility to be
17 given to his testimony.

18 You should not reject the testimony of a
19 defendant merely because of his interest. It is
20 your duty as in the case of all witnesses to accept
21 such testimony of the defendant that you believe to
22 be truthful and reject only such testimony that you
23 believe to be false. It is the quality of the
24 testimony that is controlling not the quantity of
25 the testimony or the number of witnesses testifying

1 for one side as against the other.

2 The testimony of one witness if you find
3 such testimony credible and you are satisfied from
4 that testimony and from all the other evidence that
5 is offered of the defendants guilt beyond a
6 reasonable doubt it is sufficient to convict.

7 We have heard the testimony of 2
8 witnesses who have been declared to be experts.
9 One of them a Ms. Jamie Hoffman-Rosenfeld who was
10 found to be an expert by the court of pediatric
11 medicine and child sexual abuse. And we had heard
12 from a Dr. Don Lewittes who was found by the court
13 to be an expert in clinical psychology and child
14 adolescent sexual abuse.

15 Ordinarily, a witness is limited to
16 testifying about facts and is not permitted to give
17 an opinion. However, where scientific, medical or
18 technical or other specialized knowledge will help
19 a jury to understand the evidence and to determine
20 a fact in issue a witness with expertise in a
21 specialized field may render opinions about such
22 matters.

23 You should evaluate the testimony of such
24 witnesses just as you would the testimony of any
25 other witness. You may accept or reject the

1 testimony in whole or in part just as you may with
2 respect to the testimony of any other witness.

3 In deciding whether or not to accept such
4 testimony you should consider the following. The
5 qualifications and believability of the witness.
6 The facts and circumstances upon which the
7 witnesses opinion was based. The accuracy or
8 inaccuracy, any assumed or hypothetical facts on
9 which the opinion was based. The reason given for
10 the witnesses opinion and whether the witnesses
11 opinion is consistent or inconsistent with other
12 evidence in the case.

13 Also in this trial there were references
14 to alleged sexual contact between the defendant
15 Ashley Martinez in Florida between the year 2001
16 and 2004. He is not being charged in this trial
17 with those acts. The reference in this trial to
18 those alleged incidents was permitted solely to aid
19 you in evaluating the reasons surrounding Ashley
20 Martinez's delayed reporting the crimes charged in
21 this indictment.

22 You must not under any circumstances
23 indulge in speculation or guesswork nor are you to
24 consider anything outside the evidence. Nothing.
25 Do not try to being detectives. Do not try to

1 conjecture what you would do or what might have
2 been done or could have been done. Your own
3 recollection, understanding and evaluation of the
4 facts presented in this trial is what are
5 controlling.

6 Regardless of what counsel on both sides
7 of the case may say about the facts and regardless
8 of what the court may say about the facts. You are
9 not to consider anything that I have said during
10 the trial or any questions that I may have asked or
11 anything that I may say to you during the course of
12 this charge as indicative that I have any opinion
13 on this case one way or the other.

14 Our law provides that in determining your
15 verdict you may not consider or speculate
16 concerning matters relating to sentence or
17 punishment. You are not to discuss such matters
18 nor should your deliberations in any way be
19 influenced by such matters.

20 If you render a verdict of guilty I am
21 required to impose sentence in accordance with the
22 law. The jury has no function relating to sentence
23 or punishment and such matters are wholly
24 immaterial to your deliberations. Nor are you to be
25 effected by other consideration outside the

1 evidence or by what the reaction to your verdict
2 may be whether it be popular or unpopular. Whether
3 it pleases or displeases anyone. Nor shall sympathy
4 be of any concern to the jury.

5 I have tried avoiding stating to you my
6 memory of the facts as testified. The reason for
7 that reluctance is that I may omit testimony or on
8 the other hand emphasize certain testimony that
9 would be prejudicial to the People or to the
10 defendant even if I do so subconsciously. A juror
11 may think that I thought certain testimony
12 unimportant or other testimony important.

13 The law states that you are the sole
14 judges of the facts and it's not the court. It's
15 for you to judge what evidence is credible and
16 whether you deem important. Counsel entered the
17 evidence from their own point of view. Each through
18 inferences from the evidence. You should consider
19 but you are not bound by any of those arguments.

20 You may draw your own inferences from the
21 evidence. It is your obligation to calmly,
22 patiently and intelligently discuss the evidence in
23 this case and the inferences that you draw
24 therefrom and to reason with each other to make an
25 honest effort to agree on the facts and to accept

1 the law as I give it to you.

2 We now come to you time that I will
3 explain the law that applies to the crimes alleged
4 in this indictment.

5 The first count is rape in the first
6 degree. Under our law a person is guilty of rape
7 in the first degree when he engages in sexual
8 intercourse with another person who is less than 13
9 years old and the actor is 18 years old or more.

10 Under our law it is also an element of
11 this offense that the sexual intercourse was
12 committed without the consent of that other person.
13 Sexual intercourse takes place without a persons
14 consent when that person is deemed by law to be
15 incapable of consent.

16 And under our law a person is deemed
17 incapable of consenting to sexual intercourse when
18 she is less than 13 years old. Thus sexual
19 intercourse with such a person is always deemed to
20 be without that persons consent even if in fact
21 that person did consent.

22 It is not a defense to this charge that
23 the actor did not know that the person with whom
24 the actor had sexual intercourse was less than 13
25 years old or that the actor believed that such

1 person was 13 years old or more at the time on the
2 date of the crime.

3 The term sexual intercourse used in this
4 definition -- I am sorry. The term sexual
5 intercourse used in this definition of this crime
6 has it's own special meaning in our law. I will
7 give you the meaning of that term.

8 Sexual intercourse means any penetration
9 however slight of the penis into the vaginal
10 opening. In other words any penetration of the
11 penis into the vaginal opening regardless of the
12 distance of penetration constitutes an act of
13 sexual intercourse.

14 Sexual intercourse does not necessarily
15 require erection of penis, emission or orgasm.

16 In order for you to find the defendant
17 guilty of this crime the People are required to
18 prove from all the evidence in the case beyond a
19 reasonable doubt both of the following 2 element.
20 One -- I am sorry, 3 elements.

21 One, that on or about November 30 in 2004
22 in the county of Queens the defendant Abu Khan
23 engaged in sexual intercourse with Ashley Martinez.

24 Two, that Ashley Martinez was less than
25 13 years old.

1 And three, that the defendant was 18
2 years old or more.

3 Therefore if you find that the People
4 have proven beyond a reasonable doubt each of those
5 element you must find the defendant guilty of the
6 crime of rape in the first degree as charged in the
7 first count.

8 On the other hand if you find that the
9 People have not proven beyond a reasonable doubt
10 either one or more of those elements you must find
11 the defendant not guilty of the crime of rape in
12 the first degree as charged in the first count.

13 The second count is course of sexual
14 conduct between a child in the second degree.

15 Under our law a person is guilty of
16 course of sexual conduct against a child in the
17 second degree when over a period of time not less
18 than 3 months in duration he engages in 2 or more
19 acts of sexual conduct with a child who is
20 incapable of consent by reason of being less than
21 11 years old.

22 I will now give you the meaning of the
23 following terms of sexual conduct and incapable of
24 consent. Sexual conduct means sexual intercourse
25 or sexual contact. Sexual intercourse has it's own

1 special meaning.

2 Sexual intercourse means any penetration
3 however slight. Sexual contact means any touching
4 of the sexual or intimate parts of a person not
5 married to the actor for the purpose of gratifying
6 sexual desire of either party. It includes the
7 touching of the -- it includes the touching of the
8 actor by the victim as well as the touching of the
9 victim by the actor whether directly or through
10 clothing.

11 Under New York law a person is incapable
12 of consenting to such sexual conduct when that
13 person is less than 11 years old. And it is not a
14 defense to a charge of course of sexual conduct
15 against a child in the second degree that the actor
16 did not know whether the person that he engaged in
17 sexual conduct with was less than 11 years old or
18 that the actor believed that the person was 11
19 years old or more or the date of the crime.

20 In order for you to find the defendant
21 guilty of this crime the People are required to
22 prove from all the evidence in the case beyond a
23 reasonable doubt both of the following 2 element.

24 One, that over a period of time not less
25 than 3 months in duration namely on or about and

1 between January 1 in 1997 in the county of Queens
2 let me go over that first element again. It's 2.

3 One, that over a period of not less than
4 3 months in duration namely on or between January
5 1, 1997 and December 31 in the year 2000 in the
6 county of Queens the defendant Abu Khan engaged in
7 2 or more acts of sexual conduct with Ashley
8 Martinez to wit; that the defendant did place his
9 hands on her breasts and place his penis in the
10 hands of Ashley Martinez.

11 And two, that Ashley Martinez was
12 incapable of consent because she was less than 11
13 years old.

14 Therefore, if you find that the People
15 have proven beyond a reasonable doubt both of those
16 elements you must find the defendant guilty of a
17 course of sexual conduct against a child in the
18 second degree as charged in the second count.

19 On the other hand if you find that the
20 People have not proven beyond a reasonable doubt
21 either one or both of those elements you must find
22 the defendant not guilty of the crime of course of
23 sexual conduct against a child in the second degree
24 as charged in the second count.

25 The third count is endangering the

1 welfare of a child. Under our law a person
2 endangers the welfare of a child when this person
3 knowingly acts in a manner likely to be injurious
4 to the physical, mental or moral welfare of a child
5 less than 17 years old.

6 The term knowingly has it's own special
7 meaning under our law. I will give you the meaning
8 of that term. A person knowingly acts in a manner
9 likely to be injurious to the physical, mental or
10 moral welfare of a child when this person is aware
11 that he is acting in such manner. Actual harm to
12 the child need not result.

13 The defendant must act in a manner which
14 is likely to be injurious to the physical, mental
15 or moral welfare of a child knowing of a likelihood
16 of such injury. Knowledge of the age of the child
17 is not an element of the crime and it is not a
18 defense to this charge that the defendant did not
19 know the age of the child or believe that the
20 child -- and believed the age of the child to be 17
21 years or more.

22 In order for you to find the defendant
23 guilty of this crime the People are required to
24 prove from all the evidence in the case beyond a
25 reasonable doubt each of the following 3 elements.

1 One, that on or about November 30 of 2004
2 in the county of Queens the defendant Abu Khan
3 acted in a manner likely to be injurious to the
4 physical, mental or moral welfare of Ashley
5 Martinez.

6 Two, that the defendant did so knowingly.
7 And three, that Ashley Martinez was less than 17
8 years old.

9 Therefore if you find that the People
10 have proven beyond a reasonable doubt each of those
11 elements you must find the defendant guilty of the
12 crime of endangering the welfare of a child as
13 charged in the third count.

14 On the other hand if you find that the
15 People have not proven beyond a reasonable doubt
16 any one or more of those elements then you must
17 find the defendant not guilty of the crime of
18 endangering the welfare of a child as charged in
19 the third count.

20 And in the forth and final count. That
21 count is sexual abuse in the second degree. Under
22 our law a person is guilty of sexual abuse in the
23 second degree when he subjects another person to
24 sexual contact and when such other person is less
25 than 14 years old.

1 Under our law it is also an element of
2 this offence that the sexual contact was committed
3 without the consent of that other person. And
4 sexual contact takes place without a persons
5 consent when that person is deemed by law to be
6 incapable of consent and under our law a person is
7 deemed incapable of consenting to sexual contact
8 when she is less than 14 years old.

9 Thus, sexual contact with such a person
10 is always deemed to be without that persons
11 consent. Even if in fact the person did consent.
12 It is not a defense to this charge that the actor
13 did not know that the person with whom the actor
14 had sexual contact was less than 14 years old or
15 that the actor believed that such person was 14
16 years old or more on the date of the crime.

17 The term sexual contact used in this
18 definition has it's own special meaning under our
19 law. Sexual contact means any touching of the
20 sexual or other intimate parts of a person not
21 married to the actor for the purpose of gratifying
22 the desires of either party. It includes the
23 touching by the actor -- I am sorry.

24 It includes the touching of the actor by
25 the person as well as the touching of that person

1 by the actor whether directly or through clothing.

2 In order for you to find the defendant
3 guilty of this crime the People are required to
4 prove from all the evidence in the case beyond a
5 reasonable doubt both of the following 2 elements.

6 One, that on or about November 30 of 2004
7 in the county of Queens the defendant Abu Khan
8 subjected Ashley Martinez to sexual contact by
9 touching the breasts of Ashley Martinez with the
10 hands of the defendant.

11 And two, that Ashley Martinez was less
12 than 14 years old.

13 Therefore if you find that the People
14 have proven beyond a reasonable doubt both of those
15 elements then you must find the defendant guilty of
16 the crime of sexual abuse in the second degree as
17 charged in the fourth count.

18 On the other hand if you find that the
19 People have not proven beyond a reasonable doubt
20 either one or both of those elements then you must
21 find the defendant not guilty of the crime of
22 sexual abuse in the second degree as charged in the
23 fourth count.

24 Members of the jury up to now you have
25 been admonished numerous times not to discuss this

1 case among yourselves or form any conclusions about
2 it until after you have heard the entire case. Now
3 you have heard the entire case and you can express
4 your views.

5 I am sure that I do not have to tell you
6 about the manner in which you fulfill your
7 responsibility is a sacred responsibility. When
8 you enter the room to deliberate you may find
9 various opinions and conclusions among yourselves.

10 As jurors you have a duty to consult with
11 one another and to deliberate with a view to
12 reaching an agreement that can be done without
13 violence to individual judgment. You should make
14 every effort to consider the various views
15 expressed by your fellow jurors and make every
16 effort to come to an agreement which would speak
17 the truth as far as the facts of this particular
18 case are concerned.

19 You must not go into the jury room with a
20 closed mind and refuse to listen to the opinions of
21 other jurors and decline to discuss the evidence
22 with them. You should always be open to reason and
23 to listen to the opinions of others in the jury
24 room. You should not hesitate to reexamine your own
25 views and change your opinion if convinced that

1 it's erroneous.

2 However, you have a right if you believe
3 that you are right to stick to your argument and
4 your conclusions and you should not surrender your
5 honest convictions as to the weight or the effect
6 of evidence solely because of the opinion of other
7 jurors nor for the mere purpose of returning a
8 verdict.

9 All I am saying is that you should not
10 close your mind so to prejudice the conclusion to
11 be arrived at without listening to the arguments
12 voiced by the other jurors who I am sure are just
13 as much interested in coming to an honest decision
14 in this case. You must decide the case for
15 yourselves but only after an impartial
16 consideration of the evidence with your fellow
17 jurors for the purpose of harmonizing your views
18 and decision in the interest of fair play with the
19 views of the other jurors.

20 Traditionally juror number one acts as
21 the foreperson. In order that the deliberations may
22 proceed in an orderly fashion you must have a
23 foreperson. Of course her vote is entitled to no
24 greater weight than that of any other juror.

25 And again members of the jury I to assist

1 you in your final deliberations I have prepared a
2 written sheet what is called a verdict sheet which
3 contains a list of the charges that are -- that
4 have been submitted against the defendant. And
5 that sheet also lists the options and the choices
6 that you may make after listening to all the
7 evidence and having a chance to discuss the
8 evidence.

9 What I will do is read that sheet to you.
10 And for the record it's an 8 inch by 11 sheet of
11 paper reading from top to bottom. Verdict sheet.
12 Under score People versus Abu Khan. Under
13 indictment number 2147 of 06. It's obviously
14 divided in three columns. The first column will
15 have the count and the charge. The next column will
16 be a column headed by the word guilty and the third
17 column is headed by the words not guilty.

18 So as you pan down the page and read from
19 left to side it's in the first column count number
20 one Penal law section 130.35 subdivision (4), rape
21 in the first degree. Next to that in the second
22 column. A line under guilty. In the next column a
23 line under the word not guilty.

24 Pan down further it will have count
25 number 2 Penal law section 130.80 the charge is

1 course of sexual conduct against a child in the
2 second degree. A line under guilty. A line under
3 not guilty.

4 Still further down count number 3 reading
5 from left to right Penal law section 260.10
6 subdivision (1), endangering the welfare of a
7 child. A line under guilty. A line under not
8 guilty. And the final count 4 Penal law section
9 130.60 subdivision (2). Sexual abuse in the second
10 degree. A line under guilty and a line under not
11 guilty. And the last words on this page is on a
12 line headed by the title foreperson. In order for
13 you to come to a verdict on any of these counts
14 that verdict being either guilty or not guilty.

15 All 12 of you must agree so that's the
16 only time that a marking can be made on the form as
17 to your verdict on either count is if it's a
18 unanimous verdict again meaning that all 12 of you
19 agree. That verdict will be either guilty or not
20 guilty. And you can choose to address any of these
21 charges in any order you choose. Either from the
22 top to bottom. Bottom to the top or any combination
23 that you choose.

24 Once you reach a verdict and are
25 unanimous on either of these counts your foreperson

1 will make a marking or a check or an X mark on the
2 line next to the count that represents your
3 verdict. Once you have reached a verdict on all 4
4 counts then your foreperson will of course sign her
5 name to the bottom of that form and you will send a
6 note out to me indicating that you have reached a
7 verdict in this case.

8 The court officer will bring a copy of
9 the verdict sheet to the jury room when you retire
10 for your final deliberations. At any time during
11 the deliberations you have any questions concerning
12 your review of any offenses listed on the list
13 please feel free to send in a note in writing to me
14 and I will respond to that question. If your
15 recollection of certain testimony should fail or if
16 you should find yourselves in doubt as to any of my
17 instructions on the law you may return to the court
18 for the purpose of having such testimony or
19 instructions read to you.

20 And your communication with me would be
21 in the form of again your question on a sheet of
22 paper signed by your foreperson as to the notes
23 that you send to me if you choose to do so or need
24 to do so. What I will do in this case or what I do
25 in every case is to make sure that I give you all

1 the information that you want and nothing more. So
2 for me to accomplish that goal I will need you to
3 be as clear to me as you can as to what it is that
4 you need.

5 For example, if you write a note to say
6 that you would like the instruction on the law
7 reread. Well, what that means to me is that you
8 want everything reread. So if you instead say what
9 you wanted was count one or count 2 or 4 the
10 elements or the entire charge then the more clear
11 that you are with me as to exactly what you are
12 looking for the more that I can make sure that I am
13 giving you everything what you ask for and nothing
14 more.

15 In the testimony of any witness. If you
16 want to hear the entire testimony. If you want to
17 hear the direct or cross. To the extent that you
18 can let us know we will get that to you. If there
19 is a part of any testimony of any witness on any
20 subject and I have no idea. Lets say that this is a
21 car theft case. And you were looking for the time
22 of the theft. Then if you were to send a note out
23 to me would you find in the record where various
24 witnesses had described what time that theft took
25 place. Then what we will do is to search the

1 record and find looking for the time that the car
2 theft took place and when you come back in simply
3 giving the time of theft.

4 All of this is an example of how I will
5 try to make sure that I to the best of my ability
6 to give you everything that you want and nothing
7 more. And I would need your help in that effort.

8 Upon your request the exhibits received
9 in evidence will be furnished to you in the jury
10 room. Now before you retire to the jury room to
11 deliberate I make it a practice to inquire of the
12 attorneys one last time if they feel that I have
13 omitted anything from the charge. If I have I will
14 charge you further. If I have not I will have a
15 few more words with you.

16 (Whereupon, a side-bar record begins.)

17 THE COURT: Any exceptions.

18 MR. JOHNSTON: No.

19 THE COURT: People.

20 MS. MALIK: No.

21 THE COURT: Defense any further requests.

22 MR. JOHNSTON: No.

23 THE COURT: People.

24 MS. MALIK: No.

25 THE COURT: All right.

1 (Whereupon, a side-bar record concludes.)

2 THE COURT: As you know we had taken
3 the -- anticipated that we would be working through
4 lunch. So a lunch order has been taken from you.
5 It has not yet arrived. But once it arrives it
6 will be brought in to you. And while it's your
7 decision you can either still speak with each other
8 evaluating the evidence over lunch or choose not
9 to, it's your decision.

10 I often find that having you know to sit
11 and talk as you are eating and not but it's your
12 decision once lunch arrives as to whether or not
13 you wish to continue your deliberations over lunch.

14 We have 2 alternates. They will at this
15 point be separated from the main 12 jurors. And in
16 a nice comfortable place. It will not be a closet
17 some where. It will be a window and some air. But
18 once the lunch arrives it will be furnished to all.
19 Even the alternates. Especially the alternates.

20 And as soon as you arrive at a verdict
21 you will notify the officer. You will be returned
22 to the courtroom to deliver that verdict. And with
23 that ladies and gentlemen of the jury we await your
24 verdict .

25 (Whereupon, jurors exit to commence

1 deliberations).

2 THE COURT: Counsel we are nearing the
3 lunch hour. I would like you to stay around until
4 at least maybe 5 to 1. Sometimes if there is
5 something that they can really agree to fast that
6 they want I would like to have you see that note
7 before lunch.

8 MR. JOHNSTON: I will give the clerk my
9 cell phone number. In case there is an emergency he
10 can get in touch with me instantaneously. Judge,
11 we do have to redact the medical records.

12 THE COURT: Yes. Know that the court
13 will be down from lunch from at least 1 to 2:15.
14 The records, the medical records.

15 MS. MALIK: Yes I do have the records.
16 Initially before the trial began Mr. Johnston
17 indicated that he wished me to take out the
18 portions of the medical records dealing with
19 Jaeshawn Benn who is the other victim in this case.
20 I have redacted all of that. His identity is not
21 an issue in the case. All the others are names,
22 remained the same, the defendants name, Ann
23 Martinez, Leslie Martinez and Ashley Martinez. I
24 just ask that the defense counsel be able to look
25 it over so that we can agree on it.

1 I am also going to redact that portion of
2 the file with the record and Ashley regarding the
3 passive exposure.

4 THE COURT: To.

5 MR. JOHNSTON: Marijuana.

6 THE COURT: Yes. Please show Mr.
7 Johnston.

8 (Court exhibit so marked as 1).

9 THE COURT: Also counsel you consent that
10 should they ask to see the court exhibits that I
11 can send it in to them without reassembling.

12 MR. JOHNSTON: Yes your Honor.

13 MS. MALIK: I would just ask if the
14 medical records in redacted form are acceptable to
15 the defense.

16 MR. JOHNSTON: Acceptable to the defense.

17 THE COURT: Other than that is there
18 anything further that needs to be done.

19 MR. JOHNSTON: No your Honor.

20 THE COURT: Thank you. As I said stay
21 in touch with Al. And we are in holding pattern.

22 (Whereupon, a brief recess was taken.)

23 COURT CLERK: Recall case on trial.
24 Calendar 1. 2147 of 2006. Abu Khan.

25 MR. JOHNSTON: Can we approach while we

1 are waiting judge.

2 THE COURT: Sure.

3 (Off the Record Discussion).

4 COURT OFFICER: Jury entering.

5 COURT CLERK: Both sides stipulate that
6 the sworn jurors are present and properly seated.

7 MR. JOHNSTON: Yes.

8 MS. MALIK: Yes.

9 THE COURT: Members of the jury you have
10 been working at this as you had committed to
11 certainly all morning and now all afternoon. And
12 it would seem to me that while I have your most
13 recent note I think it's an appropriate time to
14 kind of let you have a little break so I am going
15 to send you home.

16 But I will send you home with some
17 instructions and as to your most recent note which
18 will be marked court exhibit number 2 it reads can
19 you please reread count number 2 and 4 so that the
20 rereading of those count and what it says will be
21 fresh in your mind I will do that with you the
22 first thing in the morning tomorrow.

23 So members of the jury today's court
24 session is drawing to a close. I am about to
25 excuse you for the day. You must return at 9:30 in

1 the morning tomorrow morning and reassemble at the
2 place where the officer directs.

3 The law requires that before I excuse you
4 that I review with the rules that you must follow
5 through the course of the recess. They are
6 designed to guarantee the parties a fair trial and
7 are generally the ones that you are required to
8 follow prior to deliberations.

9 The law requires that I restate them to
10 you at this time in order to emphasize their
11 importance. The reason for the emphasis is that
12 you are now in a critical stage. For the process of
13 deliberations and you are not being sequestered
14 that means that you are not being kept together
15 overnight where we have a greater assurance that
16 you will be following the rules.

17 You will be permitted to go home after
18 deliberations have begun. There is maybe now be a
19 greater temptation for example to discuss the case
20 with someone else or go to the scene. You must
21 resist that temptation. To discuss the case with
22 someone else or to visit the scene would not only
23 violate my order but the oath that you took to
24 follow the rules. The rules are as follows.

25 Deliberations must be conducted only in

1 the jury room when all 12 jurors are present. All
2 deliberations must now cease and must not be
3 resumed until all 12 of you have returned and are
4 together again in the jury room.

5 During the recess do not discuss this
6 case among yourselves or with anyone else.

7 Rule 3 you remain under the obligation
8 not to request, accept, request to accept or
9 discuss with any person the receiving or payment of
10 any benefit in return for supplying any information
11 concerning the trial.

12 Rule 4 you must promptly report to me any
13 attempt by any person to converse with you about
14 the case or to influence or any other member of the
15 jury.

16 Rule 5 you must not visit or view the
17 place where the crime charged was allegedly
18 committed or any other place discussed in the
19 testimony.

20 And rule 6 you must not read, view or
21 listen to any accounts or discussions of this case
22 recorded by any news media if there be any.

23 Now the reason why the rules are so
24 important. The law does not want you to talk to
25 anyone about the case or to permit anyone to talk

1 to you about the case. Only the 12 of you have
2 been authorized to render a verdict in this case.
3 Only you have been found to be fair and only you
4 have promised to be fair. No one has been so
5 qualified.

6 The law does not permit you to visit the
7 place discussed in the testimony. And second even
8 if it were in the same condition once you go to a
9 place discussed in the testimony to evaluate the
10 evidence in light of what you have seen you become
11 a witness and not a juror and as a witness you may
12 have an erroneous view of the scene that is not
13 subject to correction by either of the parties and
14 of course that would not be fair.

15 Finally the law requires that you not
16 read or listen to any news accounts of this case
17 should there be any. You must decide the case on
18 the evidence presented in the courtroom. You are
19 not to decide the case based on a reported view or
20 opinion.

21 Again, I trust that you understand and
22 appreciate the importance of following the rules
23 and in accordance with the oaths that you promised
24 and made to me I know that you will do so. Again
25 after those instructions and with this note that I

1 just received I will the first thing in the morning
2 reread to you count number 2 and count number 4.

3 So have a great night. Following the
4 instructions of the officer. See you tomorrow
5 morning at 9:30 AM.

6 (Whereupon, jurors exit the courtroom).

7 THE COURT: Anything further.

8 MS. MALIK: No your Honor.

9 MR. JOHNSTON: No your Honor.

10 THE COURT: Counsel see you in the
11 morning.

12 (Whereupon, court stands in recess until
13 tomorrow, March 29, 2007 at 9:30 AM).

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1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF QUEENS: CRIMINAL TERM: Part K-20

3 -----x Indictment No.
4 THE PEOPLE OF THE STATE OF NEW YORK : 2147/2006

5 -against- :

6 :

7 ABU KHAN :

8 Defendant :

9 -----x

10 March 29, 2007

11 125-01 Queens Boulevard
12 Kew Gardens, New York 11415

13 B E F O R E: THE HONORABLE RONALD HOLLIE,
14 Justice

15 A P P E A R A N C E S:

16 Honorable Richard A. Brown
17 For the People:
18 District Attorney - Queens County
125-01 Queens Boulevard
19 Kew Gardens, New York 11415
BY: MINA MALIK, ESQ.
Assistant District Attorney

20
21 For the Defendant:
ROBERT JOHNSTON, ESQ.
22 Defense Counsel

23
24 Viola L. Dunnom, SCR

25

1 COURT CLERK: Calendar 1. Indictment
2 2147 of 06. Abu Khan. From the pens.

3 MR. JOHNSTON: Robert H. Johnston for the
4 defendant.

5 MR. VIRUET: Samuel Viruet for the
6 defendant.

7 MS. MALIK: Mina Malik. Good morning your
8 Honor.

9 THE COURT: Good morning counsel, all.

10 COURT CLERK: Defendant incarcerated.
11 Produced. Present before the court.

12 THE COURT: Good morning Mr. Khan.

13 THE DEFENDANT: Good morning.

14 THE COURT: Are we ready.

15 MR. JOHNSTON: Yes judge.

16 MS. MALIK: Yes.

17 COURT OFFICER: Jury entering.

18 COURT CLERK: Both sides stipulate to the
19 presence and proper seating of the jury.

20 MR. JOHNSTON: Yes.

21 MS. MALIK: Yes.

22 THE COURT: Good morning. Again just
23 looking at your note from last night can you please
24 reread count number 2 and 4.

25 The second count is course of sexual

1 conduct against a child in the second degree.

2 Under our law a person is guilty of
3 course of sexual contact against a child in the
4 second degree again when over a period of time not
5 less than 3 months of duration he engages in 2 or
6 more acts of sexual conduct with a child who is
7 incapable of consent by reason of being less than
8 11 years old.

9 I will now give you the meaning of the
10 following terms. Sexual conduct and incapable of
11 consent. Sexual conduct means sexual intercourse
12 or sexual contact. Sexual intercourse has it's own
13 special meaning. Sexual intercourse means any
14 penetration however slight.

15 Sexual contact means any touching of the
16 sexual or other intimate part of a person not
17 married to the actor for the purpose of gratifying
18 sexual desire of either party. It includes the
19 touching of the actor by the victim as well as the
20 touching of the victim by the actor whether
21 directly or through clothing.

22 Under New York law a person is incapable
23 of consenting to sexual conduct when that person is
24 less than 11 years old. And it is not a defense to
25 a charge of course of sexual conduct against a

1 child in the second degree that the actor did not
2 know that the person with whom the actor engaged in
3 sexual conduct was less than 11 years old or that
4 the actor believed that such person was 11 years
5 old or more on the date of the crime.

6 In order for you to find the defendant
7 guilty of this crime the People are required to
8 prove from all the evidence in the case beyond a
9 reasonable doubt both of the following 2 elements.

10 One, that over a period of time not less
11 than 3 months in duration namely on or about and
12 between January first in the year 1997 and December
13 31 in the year of 2000 in the county of Queens the
14 defendant Abu Khan engaged in 2 or more acts of
15 sexual contact with Ashley Martinez. In that the
16 defendant did place his hands on the breasts and
17 place his penis in the hands of Ashley Martinez.

18 And number two that Ashley Martinez was
19 incapable of consent because she was less than 11
20 years old.

21 Therefore, if you find that the People
22 have proven beyond a reasonable doubt those
23 elements then you must find the defendant guilty of
24 course of sexual contact against a child in the
25 second degree as charged in the second count.

1 On the other hand if you find that the
2 People have not proven beyond a reasonable doubt
3 either one or both of those elements then you must
4 find the defendant not guilty of the crime of
5 course of sexual conduct against a child in the
6 second degree charged in the second count.

7 Count 4 is sexual abuse in the second
8 degree. Under our law a person is guilty of sexual
9 abuse in the second degree when he subjects another
10 person to sexual contact and when such other person
11 is less than 14 years old.

12 Under our law it is also an element of
13 this offense that the sexual contact was committed
14 without the consent of that other person. And
15 sexual contact takes place, takes place without a
16 persons consent when this person is deemed by law
17 to be incapable of consent.

18 Under our law a person is deemed
19 incapable of consenting to sexual contact when she
20 is less than 14 years old. Thus sexual contact
21 with such a person is always deemed to be without
22 the persons consent. Even if in fact that person
23 did consent. It is not a defense to the charge
24 that the actor did not know the person with whom
25 the actor had sexual contact was less than 14 years

1 old or that the actor believed that such person was
2 14 years old or more on the date of the crime.

3 The term sexual contact used in this
4 definition has it's own special meaning. Its
5 meaning is as follows. Sexual contact means any
6 touching of the sexual or other intimate part
7 parties of a person not married to the actor for
8 the purpose of gratifying the sexual desire of
9 either party.

10 It includes touching of the actor by the
11 person as well as of the touching of that person
12 by the actor whether directly or through clothing.

13 In order for you to find the defendant
14 guilty of this crime the People are required to
15 prove from all of the evidence in the case beyond a
16 reasonable doubt both of the following 2 elements.

17 One, that on or about November 30 in the
18 year 2004 in the county of Queens the defendant Abu
19 Khan subjected Ashley Martinez to sexual contact by
20 touching the breasts of Ashley Martinez with the
21 hand of the defendant.

22 And two, that Ashley Martinez was less
23 than 14 years old.

24 Therefore if you find that the People
25 have proven beyond a reasonable doubt both of those

1 elements then you must find the defendant guilty of
2 the crime of sexual abuse in the second degree as
3 charged in the fourth count.

4 On the other hand if you find that the
5 People have not proven beyond a reasonable doubt
6 either one or both of those elements then you must
7 find the defendant not guilty of the crime of
8 sexual abuse in the second degree as charged in the
9 fourth count.

10 Those are -- that is a rereading of count
11 number 2 and 4. If you need those count reread
12 again or if you need them read slower or if you
13 need the elements again whatever it is that you
14 want or need just let me know in any future notes
15 that you send me.

16 (Whereupon, jury exits the courtroom to
17 continue deliberations).

18 THE COURT: Any exceptions counsel.

19 MR. JOHNSTON: No your Honor.

20 MS. MALIK: No your Honor.

21 THE COURT: Anything further.

22 MS. MALIK: No your Honor.

23 MR. JOHNSTON: No your Honor.

24 (Whereupon, court stands in recess)

25 COURT CLERK: Come to order. Case on

1 trial continued.

2 THE COURT: Counsel approach.

3 (Off the Record Discussion).

4 THE COURT: All counsel is present as is
5 the defendant. Counsel I have a most recent note
6 from the jury. And it indicates that they would
7 like some parts of the testimony reread and they
8 would like the testimony of Ashley Martinez and Abu
9 Khan about what happened on the day of November 30.
10 I think that we should be able to find that at the
11 minimum within the next 45 minutes. So we will
12 recess it's now 11: 31. If you can contact us back
13 certainly be prepared to go forward with this
14 matter by a quarter after 12.

15 (Whereupon, a brief recess was taken.).

16 COURT CLERK: Case on trial continued.
17 All parties are present. No jury is present at
18 this time.

19 COURT OFFICER: Jury entering.

20 COURT CLERK: Both sides stipulate to the
21 presence and proper seating of the jury.

22 THE COURT: I have your most recent
23 note. And it reads it's been marked court exhibit
24 number 3. Can you please reread the testimony of
25 Ashley Martinez and Abu Khan of the date of

1 November 30 in the year 2004. We have that for you
2 now. We will begin with Ashley's direct and cross
3 of examination. And following that the direct and
4 cross as far as Abu Khan is concerned.

5 (Whereupon, the requested portion was
6 read back.)

7 THE COURT: Counsel approach please.

8 (Whereupon, an off the record discussion
9 was held at the bench.)

10 THE COURT: Okay. As you just heard you
11 heard the read back direct and cross of counsel of
12 these 2 witnesses Ashley Martinez Abu Khan. Again
13 if you have any further questions just let us know
14 with a note. And again we await your verdict. And
15 your lunch has been ordered. Enjoy if and when it
16 arrives.

17 THE COURT: Anything further counsel.

18 MR. JOHNSTON: Nothing your Honor.

19 MS. MALIK: No your Honor.

20 MR. JOHNSTON: Judge it's about 5 to 1.

21 THE COURT: Yes the part will be down for
22 lunch. The part is going to be down for lunch.

23 MR. JOHNSTON: All right. We will be back
24 at 2.

25 (Whereupon, a luncheon recess was taken.)

1 COURT CLERK: Case on trial continued.

2 All parties are present. No jurors are
3 present at this time.

4 THE COURT: I have a note which I expect
5 will be the last note. They have reached a
6 verdict. You know that counsel.

7 MR. JOHNSTON: Now I do.

8 MS. MALIK: Now we do.

9 THE COURT: Depending upon the verdict
10 would you want them polled.

11 MS. MALIK: No your Honor.

12 MR. JOHNSTON: No.

13 (Court exhibit number 4 so marked.)

14 COURT OFFICER: Jury entering.

15 COURT CLERK: Both sides stipulate to the
16 presence and proper seating of the jury.

17 MR. JOHNSTON: Yes.

18 MS. MALIK: Yes.

19 THE COURT: Members of the jury I have in
20 my hands what I expect will be your last note to
21 me. It reads we have a reached a verdict. Is that
22 true madam forelady.

23 JURY FORELADY: Yes.

24 THE COURT: Take the verdict.

25 COURT CLERK: Would you please rise. As

1 to count number 1, rape in the first degree how do
2 you find the defendant?

3 JURY FORELADY: Guilty.

4 COURT CLERK: As to count 2, course of
5 sexual conduct against a child in the second degree
6 how to you find the defendant?

7 JURY FORELADY: Guilty.

8 COURT CLERK: As to count 3, endangering
9 the welfare of a child how do you find the
10 defendant?

11 JURY FORELADY: Guilty.

12 COURT CLERK: As to count 4, sexual abuse
13 in the second degree, how do you find the
14 defendant?

15 JURY FORELADY: Guilty.

16 THE COURT: Please be seated.

17 COURT CLERK: Members of the jury listen
18 to your verdict as it stands recorded.

19 You say through your foreperson that you
20 and each of you find the defendant Abu Khan on
21 count number 1, rape in the first degree; guilty.

22 Count 2, course of sexual conduct against
23 a child in the second degree; guilty.

24 Count 3, endangering the welfare of a
25 child; guilty.

1 Count 4, sexual abuse in the second
2 degree; guilty.

3 Juror Number One, is that your verdict.

4 JUROR NUMBER ONE: Yes.

5 THE COURT CLERK: Juror Number Two, is
6 that your verdict?

7 JUROR NUMBER TWO: Yes.

8 THE COURT CLERK: Juror Number Three, is
9 that your verdict?

10 JUROR NUMBER THREE: Yes.

11 THE COURT CLERK: Juror Number Four, is
12 that your verdict?

13 JUROR NUMBER FOUR: Yes.

14 THE COURT CLERK: Juror Number Five, is
15 that your verdict?

16 JUROR NUMBER FIVE: Yes.

17 THE COURT CLERK: Juror Number Six, is
18 that your verdict?

19 JUROR NUMBER SIX: Yes.

20 THE COURT CLERK: Juror Number Seven, is
21 that your verdict?

22 JUROR NUMBER SEVEN: Yes.

23 THE COURT CLERK: Juror Number Eight, is
24 that your verdict?

25 JUROR NUMBER EIGHT: Yes.

1 THE COURT CLERK: Juror Number Nine, is
2 that your verdict?

3 JUROR NUMBER NINE: Yes.

4 THE COURT CLERK: Juror Number Ten, is
5 that your verdict?

6 JUROR NUMBER TEN: Yes.

7 THE COURT CLERK: Juror Number Eleven, is
8 that your verdict?

9 JUROR NUMBER ELEVEN: Yes.

10 THE COURT CLERK: Juror Number Twelve, is
11 that your verdict?

12 JUROR NUMBER TWELVE: Yes.

13 The jury has been polled, your Honor.

14 THE COURT: Verdict has been confirmed.

15 Thank you Carl. This has not been an easy case and
16 not that any one case is but it is very difficult.

17 I understand it to be and I know that all
18 the attorneys understand it to be very difficult to
19 sit in judgement of another human being for acts
20 that had been committed against another outside of
21 your presence. And this system relies on jurors
22 that are willing to carry through the commitment
23 that they make to all sides to give each side in a
24 trial like this a fair trial.

25 It's clear to me that based on the effort

1 that you all put into that, that you had done just
2 that. You had listened to all of the evidence in
3 the case. You had patiently sat through the
4 inherent delays in becoming a juror in the
5 courtroom, outside the courtroom and all of the
6 delays that result and through it all you have each
7 been patient with the system. Been patient with
8 me. Patient with counsel. And in the end did the
9 duties that you had promised each side that you
10 would do. For that I thank you.

11 I know that each counsel thanks you.
12 Your work in this case has now ended. I also want
13 to extend a special additional thanks to the two
14 alternates. While you did not have a chance to
15 deliberate I wanted to make sure that even though
16 you were not in the room with the other jurors who
17 had been chosen with you that you were in the box
18 with them at the time that they delivered the
19 verdict so that you would have a chance to at least
20 hear the end of the case.

21 Yours is maybe the most difficult if that
22 could be said, service as a juror because you have
23 heard all the evidence that they have. You heard
24 the entire read back that they heard. And yet you
25 had not had a chance to share your thoughts with

1 the other 12 jurors. Yours was a uniquely
2 difficult job. I thank you for the added effort
3 that you made.

4 With that all of your service coming to
5 an end it comes to an end with my thanks and maybe
6 the only thing that I can say to you now which may
7 be good for most of you is that you will not be
8 called back to serve for another 6 years. And so
9 that's a small solice, but hopefully over the
10 course of those 6 years it will be enough.

11 Again thank you for your service. I will
12 have a few words with you in the back. See you in
13 about 6 years or so. Thank you.

14 COURT OFFICER: Jurors follow me please.
15 (Jurors exit the courtroom).

16 THE COURT: The defendant has been found
17 guilty after trial of a B felony. His bail status
18 is changed to remand. Stern date counsel. I will
19 need at least 4 weeks.

20 MR. JOHNSTON: April 16th is that a good
21 date.

22 THE COURT: That's a Monday. Yes it is.
23 People.

24 MS. MALIK: Your Honor, I know that the
25 victim would like to speak at sentencing in this

1 case. Can I have a moment to confer with her.

2 THE COURT: Sure.

3 MS. MALIK: April 16th is find your Honor.

4 COURT CLERK: April 16 th.

5 THE COURT: All right. April 16th for
6 sentence. And if there is any reason counsel that
7 you believe that the for some reason that the case
8 cannot go forward for sentence on the 16th please
9 let us know in enough time so that -- the victim is
10 still living in Florida.


11 MS. MALIK: Yes your Honor.

12 THE COURT: So that if we can avoid
13 unnecessary trips back and forth from state to
14 state I would want to do that. April 16th for
15 sentence.

16 COURT CLERK: Thank you. Take charge.

17
18 * * * * *

19 The foregoing is certified to be a true
20 and accurate transcript of the original stenographic
21 minutes taken of this proceeding.

22
23 

24 Viola L. Dunnom, SCR

25

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM, PART K-20

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No.
2147-2006

-against-

Sentence

ABU KHAN,

Defendant.

-----X

JULY 24, 2007

Queens Supreme Court
125-01 Queens Boulevard
Kew Gardens, New York 11415

B E F O R E :

THE HONORABLE RONALD D. HOLLIE ,
Justice, Supreme Court.

A P P E A R A N C E S :

For the People:

RICHARD A. BROWN, ESQ.
District Attorney, Queens County
By: MINA MALIK, ESQ.
Assistant District Attorney

For the Defendant:

SAMUEL VIRUET, ESQ.
191 East 161st Street
Bronx, New York

Mindy S. Elgarten
Official Court Reporter

CA#
168107
copy

1 COURT CLERK: Calendar number 1,
2 Indictment Number 2147 of 2006, Abu Khan.

3 THE COURT: Counsel appearances,
4 please.

5 MR. VIRUET: Samuel Viruet, 191 East
6 161st Street, Bronx, New York, for the defendant.

7 MS. MALIK: For the People, assistant
8 district attorney Mina Malik.

9 THE COURT: Prior to this case being
10 called into the record I had a sidebar conference
11 with both counsel and thinking back to the time
12 when this matter was last on the calendar that
13 date I believe was on June 12th. At that date --
14 on that date this case was adjourned to this
15 date, July 24th, for sentence. And I had advised
16 both counsel since the only issue that was
17 standing in the way of the defendant being
18 sentenced is a determination and maybe even a
19 hearing on the question of whether or not this
20 defendant is a predicate felon based upon an
21 arrest he had in Florida back in 1994.

22 Counsel, defense counsel, had filed a
23 notice of motion in opposition to the defendant
24 being found a predicate felon and his affirmation
25 was served on the Court and the D.A.'s Office on,

1 I believe, June 22nd.

2 I'm advised by the assistant that she
3 has filed a response to that notice of motion.

4 People, when was that notice served on
5 either counsel or this Court?

6 MS. MALIK: July 20th, your Honor.

7 THE COURT: That's this past Friday,
8 three days ago.

9 MS. MALIK: Yes, your Honor.

10 THE COURT: How was it served to
11 defense counsel?

12 MS. MALIK: It was is sent to him
13 overnight, Federal Express, your Honor.

14 THE COURT: Do you have proof of
15 written delivery on defense counsel?

16 MS. MALIK: I do not have it with me
17 right now but I do have the FedEx airbill our
18 office filled out and that we deposited at the
19 local Federal Express station.

20 THE COURT: Mr. Viruet, it's now
21 Tuesday the 24th; have you received a copy of
22 that?

23 MR. VIRUET: No, your Honor. I have
24 not received copies, nor have I received
25 communication from the District Attorney

1 regarding this matter.

2 As the Court had stated, I served the
3 motion nearly a month ago and I think it would
4 have been prudent and indeed ethical, for the
5 People to have given me enough time for me to
6 respond to the motion which has been orally
7 discussed with the Court without me being served.

8 In my motion I made a lot of demands
9 for discovery particularly as it pertains to the
10 plea that was taken in Florida for the minutes of
11 that plea. The statute in which the People
12 provide, their argument, it is their burden to
13 provide that statute as it is my burden to
14 controvert those statutes and none of that has
15 been done. The District Attorney did in fact and
16 substance what she did last time which was to
17 serve me with a predicate statement on the eve of
18 sentence and the Court became somewhat concerned
19 about that issue specifically for the District
20 Attorney to notify me ahead of time for me to be
21 able to controvert or to file a rely on those
22 issues. That has not been done.

23 By the way, I was in the office all day
24 yesterday. I had three matters in Supreme Court.
25 I have not been notified of any documents. I

1 submit to the Court as an officer of the Court --
2 as an attorney, that I have not received any
3 documents from the District Attorney. As I stand
4 here with you, your Honor, I think it's improper
5 and inappropriate for District Attorney to make
6 an oral argument to the Court on the issue of
7 predicatedness. The defendant's entitled to have
8 a hearing on the issue of being a predicate. My
9 argument was set on the motion papers.

10 I respectfully request because I have
11 not been served with the papers that my motion is
12 being deemed without opposition at this time.

13 MS. MALIK: I would like to say --

14 THE COURT: For the record, it should
15 be noted that the defendant was convicted in this
16 part on the Queens Indictment on 3-28 of '07 and
17 after that date the matter was adjourned for
18 sentence.

19 My records indicate that the dates
20 after the conviction, this matter was adjourned
21 for sentence the first day was 4-16. The next
22 date was 4-18. The dates following that was
23 5-14. The date following that was 6-12. And now
24 we are at 7-24. Certainly it became -- I was
25 first advised -- defense counsel I believe was

1 first advised that the People would be seeking to
2 file a predicate statement against the defendant
3 at the very latest date by 5-14 of '07. It's now
4 over two and a half months after that date.

5 On the last adjourned date -- meaning
6 on 6-12 I did in fact advise both counsel -- in
7 particular the assistant D.A. since it's the
8 effort that they had with both the Court and
9 defense on notice of what it is they wanted to do
10 to make sure they communicate with defense
11 counsel in giving to the defense all available
12 information as to what the D.A.'s position now is
13 or proof that the defendant should be adjudged a
14 predicate felon based on this conviction.
15 Apparently -- and this has been a problem before
16 -- I have indicated to the People that they
17 should give defense notice of what it is they
18 intend to argue and a record upon which they
19 choose to base that argument. That should have
20 been done in advance of our being present in
21 court here today.

22 Standing here, Miss Malik, without
23 proof of when you've served defense counsel, and
24 hearing from you that the earliest was possibly
25 on this past Friday, that is simply not enough

1 time, even if it had been served upon counsel,
2 for him to assess what the evidence is that you
3 have provided and make a reasonable and cogent
4 argument on the issue before this Court today.
5 You put the defense in an unfair position as far
6 as your position; that is, he's a predicate
7 felon. It also puts the Court in a difficult
8 position because I, too, wanted to have enough
9 time to review what it is that you seek to submit
10 in support of your position and to make a fair
11 judgment as to what an appropriate disposition of
12 the sentence on this matter should be, and I
13 thought that we were heading in this direction
14 meaning that I didn't want any further delays in
15 this sentence, and I had hoped that you would
16 have, Miss Malik, understood that and given to
17 the defense the kind of information he's asked
18 for in his motion. His notice of motion was
19 served on the Court and on you on June 27th. In
20 it he has in this motion asked for -- and I think
21 it's reasonable -- he's asked for any minutes of
22 the plea that the defendant had taken in Florida,
23 a judgment and assessment as to how that plea was
24 adjudicated by authorities in Florida. Neither
25 -- none of that information has been provided to

1 the defense in a timely manner and we are now on
2 a date that I had set as a final date for
3 sentence. Miss Malik?

4 MS. MALIK: Your Honor, my office
5 served Mr. Viruet with our affirmation in
6 opposition on July 20th. We mailed it via
7 Federal Express overnight delivery to 191 East
8 161st Street in the Bronx, New York.

9 THE COURT: What proof do you have in
10 court that that was done?

11 MS. MALIK: If you would like, your
12 Honor, I could go back to my office and get the
13 Federal Express bill.

14 THE COURT: I am asking you what proof
15 do you have today it was done.

16 MS. MALIK: Your Honor, I could go back
17 to my office and get the Federal Express bill.

18 THE COURT: Ma'am, you don't have proof
19 today of you having served him on the day that
20 you indicated, do you?

21 MS. MALIK: I do have proof, your
22 Honor. It may not be in this room right now.

23 THE COURT: Listen, just answer my
24 question. Do you have proof as you stand here
25 today of him having been served as you just

1 indicated?

2 MS. MALIK: The affirmation of service
3 by mail constitutes a statement of service and
4 that should be acceptable by the Court.

5 THE COURT: Do you have that with you
6 in court today?

7 MS. MALIK: I have the affirmation of
8 service, I believe the Court has it in its file,
9 that it was served on the defense. If the Court
10 would like to take a look at the court file, I've
11 seen it there this morning.

12 THE COURT: Al, is it there?

13 I have here what's been -- it's -- it
14 says an affirmation of service by mail. Tracy
15 Sabotta (phonetic) legal intern at the district
16 attorney's office affirms and says on June 21st
17 she serves attorney Samuel Viruet addressed as
18 follows: Office of Samuel Viruet, 191 East 161st
19 Street, Bronx, New York 10451. * You, by that
20 purpose and in the course of business of the
21 District Attorney's Office, address same as this
22 address, and was stamped 80-02 Queens Boulevard,
23 Kew Gardens, New York 11415. Sworn to this 20th
24 day of July 2007 by Tracy Sabotta and sworn to
25 before me. So it is not notarized.

1 MS. MALIK: Your Honor, are you saying
2 that's not acceptable to the Court?

3 THE COURT: I am saying with defense
4 counsel telling me he has not been served and
5 with you offering as proof to me that there was
6 service, an affirmation that does not -- that was
7 not sworn to by the person who had allegedly
8 served him by mail, that is not acceptable proof
9 to me.

10 MS. MALIK: The person who served that
11 is in the courtroom today. Would you like her to
12 be on the record?

13 THE COURT: I had asked you today
14 whether or not you had proof of service of this
15 affirmation in opposition on defense counsel.
16 You said you do and the proof of service that you
17 have is an affirmation that's been filed with
18 this Court. I looked at the affirmation that's
19 been filed with the Court and I'm saying that
20 that affirmation is unacceptable as proof of
21 service.

22 MS. MALIK: Very well, your Honor. I
23 have the person in court today. Would you like
24 to hear from her herself?

25 THE COURT: We have a further problem

1 and that is even if the affirmation in opposition
2 was served on the 20th defense counsel has said
3 that he has not received it either on the 20th,
4 the 21st, the 22nd was a Sunday. He was in his
5 office all day Monday and did not receive it
6 then. We are now on a day where this matter was
7 set final for sentence. He has asked for certain
8 information from you as to the minutes of the
9 allocution by the defendant in Florida.

10 What evidence do you have to either
11 show him today or to show the Court about the
12 minutes of the defendant's allocution in Florida?

13 MS. MALIK: Your Honor, I do not have
14 the minutes of the allocution in Florida. Those
15 are not available to me. However, defense cited
16 CPL 240 discovery section of the Criminal
17 Procedure Law as authority for me to turn over
18 the minutes of the plea allocution in Florida and
19 under that statute I am not obligated to turn
20 over the plea allocution of the Florida plea
21 allocution to him. Also, it's equally available
22 to the defense. He could just as easily had
23 ordered it himself. I do have something that
24 says he was convicted in Florida. It's a finding
25 of guilt. It says the State of Florida versus

1 Abu Khan. It says appearing on to the Court that
2 the defendant being personally before the Court
3 accompanied by his or her attorney, L. Corrvo,
4 has been found guilty of grand theft, motor
5 vehicle, and burglary as set forth in the
6 Information by the Court upon the Court of an
7 entry of a guilty plea it being upon a hearing of
8 the matter that the defendant is not likely to
9 engage in a criminal conduct and that the ends of
10 justice and welfare of society shall not
11 defendant suffer penalty by law and it is
12 therefore ordered and adjudged an adjudication of
13 guilt be hereby withheld. It is further ordered
14 and adjudged that the defendant is sentenced for
15 credit for time served; to wit: 2 days.

16 THE COURT: Why would an adjudication
17 withheld constitute a finding of guilt?

18 MS. MALIK: Well, I will tell you, your
19 Honor, according to the Florida Criminal
20 Procedure and Corrections Law Section 921.00(II)
21 a conviction means a determination of guilt that
22 is the result of a plea or a trial regardless of
23 whether adjudication is withheld. The definition
24 of conviction in New York is consistent with the
25 Florida definition. Under the New York Criminal

1 Procedure Law conviction means the entry of a
2 plea of guilty to, or a verdict of guilty upon,
3 an accusatory instrument other than a felony
4 complaint, or to one or more counts in such
5 instrument. That's pursuant to New York Criminal
6 Procedure Law Section 1.20.

7 Further, New York courts have
8 considered a Florida disposition of adjudication
9 held to be a conviction. I cite to the Court
10 People ex rel Cassarino versus New York State,
11 Division of Parole, 170 Misc 2d, 47, Kings County
12 1998 where the Court held: It is of no
13 consequence how a Florida court would consider a
14 guilty plea with adjudication withheld as New
15 York State has the power to adjudication withheld
16 as a conviction.

17 I would just like to point out, your
18 Honor, that the defendant in finding his
19 definition of adjudication withheld used a dot
20 com website whereas we actually looked at the
21 Florida statute in this case.

22 And if I might, your Honor, the Florida
23 burglary statute which the defendant plead guilty
24 to is equivalent to the New York burglary in the
25 third degree statute, so therefore that

1 constitutes a felony.

2 THE COURT: Again, this is all in the
3 blind because you have not given either defense
4 counsel or me advance notice of this. So in
5 asking the questions that I really shouldn't have
6 to answer at this point because I would know it
7 from having read your brief. What offense from
8 Florida did the defendant admit to.

9 MS. MALIK: Grand theft motor vehicle
10 and burglary.

11 THE COURT: And burglary?

12 MS. MALIK: Yes, there are two.

13 THE COURT: Burglary what?

14 MS. MALIK: Burglary. It just says
15 unoccupied.

16 THE COURT: Burglary unoccupied meaning
17 of a car, of a house? Burglary of what?

18 MS. MALIK: I believe of a building.

19 THE COURT: But you don't know what it
20 is.

21 MS. MALIK: The burglary section is
22 Florida Section 810.02 and the theft statute is
23 Florida Section 812.014.

24 THE COURT: And what are the underlying
25 facts of that Florida matter?

1 MS. MALIK: I believe that he entered a
2 building down in Florida, your Honor. I think it
3 was a commercial establishment and he stole a car.

4 THE COURT: You think or you know.

5 MS. MALIK: Those are the facts as I
6 recollect them, your Honor.

7 THE COURT: Again, those facts, are you
8 looking -- did you look at a complaint? Do you
9 have a copy of the complaint from Florida? Are
10 you looking at a police report? What are you
11 basing this information as to what the thing is
12 that in an unauthorized way he entered, whether
13 it was a car, a house or whatever.

14 MS. MALIK: I am basing it on my
15 recollection of a conversation from somebody down
16 in Florida, either the Court clerk's office or
17 the state attorney's office, your Honor. But
18 regardless of that fact the underlying facts
19 which is are not important here, the fact is he
20 was convicted of theft of a vehicle and burglary.

21 THE COURT: A burglary. If you're
22 telling me that he should be found as a predicate
23 based on a burglary where the only thing I have
24 reason to know at this point that he may possibly
25 have been involved with is a car. A car

1 involvement and a burglary are two entirely
2 different types of crimes. So that's why I was
3 asking you the basis of your information what the
4 burglary is based on, being in a car?

5 MS. MALIK: Your Honor, you look at the
6 statutes, the Florida statutes and you compare
7 them to the New York statutes and that's how we
8 figure out if it's the equivalent of a New York
9 statute.

10 THE COURT: No. You look at --
11 certainly if you're trying to bootstrap a felony
12 burglary on this defendant here then I should
13 know whether or not they classify a burglary
14 being in a car in an unauthorized way, because
15 frankly unauthorized being in a car in an
16 unauthorized manner could be an A misdemeanor.

17 MS. MALIK: That's not what he was
18 convicted of.

19 THE COURT: So the underlying facts you
20 don't have those. You're going on the basis of
21 the conviction. I should be guided solely by the
22 certificate used of conviction.

23 MS. MALIK: The defendant also testified
24 as to what happened in Florida when he took the
25 stand he also testified to those facts. He said

1 he went into a building, he took a car and his
2 boss thought that he shouldn't have this car and
3 he plead guilty but he didn't do any jail time.
4 If I remember correctly that's what the defendant
5 said.

6 THE COURT: Anything else, Miss Malik?

7 MS. MALIK: Does the Court want me to
8 go on with the argument or is the Court going to
9 sentence him today.

10 THE COURT: I said this is final.

11 MS. MALIK: I would like to point out
12 if the Court is considering a second felony
13 offender status then the Court is mandated to
14 sentence him as a second felony offender in light
15 of the fact this is final for sentence today. I
16 would like to go on with my argument.

17 With respect to the theft conviction
18 Florida statute 812.014 subsection 2-B (4) the
19 Second Department has held grand theft in
20 violation of Section 812.04 is a recognizable
21 felony in the State of New York. I cite to the
22 Court En Re Pelle, 106 AD 2d 1 Second Department
23 1985.

24 THE COURT: Are you saying that there
25 was an offense mentioned in the Florida records

1 that has a statute quoting a section and
2 subdivision, et cetera?

3 MS. MALIK: Yes, your Honor.

4 THE COURT: What was the -- what do you
5 believe to be the section that the defendant had
6 been adjudicated in violation of in Florida?

7 MS. MALIK: Florida statute Section
8 810.02.

9 THE COURT: And --

10 MS. MALIK: I'm sorry, for burglary as
11 well as for theft, Florida statute Section
12 812.014.

13 THE COURT: And 812.014 is what?

14 MS. MALIK: Theft.

15 THE COURT: It's just called theft?

16 MS. MALIK: Yes.

17 THE COURT: Okay. Now you have cited
18 an appellate division decision that says what?
19 You just mentioned a case.

20 MS. MALIK: That the Second Department
21 has held that grand theft, which is what the
22 defendant was convicted of here, grand theft of a
23 motor vehicle.

24 THE COURT: I'm sorry. I thought you
25 just said that the statute that he had been found

1 had be adjudicated was in violation of 812.014
2 which is just called theft.

3 MS. MALIK: I miss-spoke. It's grand
4 theft motor vehicle.

5 THE COURT: Okay.

6 THE COURT: 812.014 in Florida, what is
7 the name of that -- what is the name of that
8 statute?

9 MS. MALIK: Grand theft, motor vehicle.

10 THE COURT: And what evidence do you
11 have that the defendant had been adjudicated as
12 having violated that statute?

13 MS. MALIK: My conversation with a
14 clerk from the Miami Dade County Clerk's Office
15 of the 11th judicial circuit.

16 THE COURT: So that's based on a
17 conversation you had with a clerk.

18 MS. MALIK: Yes, your Honor.

19 THE COURT: That's your proof. Okay.

20 And now of the evidence as to his
21 violating adjudicated as having violated section
22 810.02.

23 What is the title of that statute?

24 MS. MALIK: Burglary, your Honor.

25 THE COURT: It's not grand burglary

1 or -- it's just burglary?

2 MS. MALIK: Yes.

3 THE COURT: Okay.

4 Do you know whether or not it's a home
5 or place of business?

6 MS. MALIK: It's a structure or
7 conveyance. You're asking me if I know in the
8 underlying facts whether --

9 THE COURT: Correct. Whether in the
10 underlying facts of this case do you know if it
11 was a home or a business?

12 MS. MALIK: I believe it's a business.

13 THE COURT: But you don't know.

14 MS. MALIK: I am going on my
15 recollection. I believe it's a business.

16 THE COURT: That recollection is based
17 on a conversation you had with a clerk down in
18 Florida.

19 MS. MALIK: Yes.

20 THE COURT: Anything else, Miss Malik?

21 MS. MALIK: In addition to the burglary
22 in Florida under the statute it states in effect
23 in the Florida statute one of the elements is
24 burglary in the third degree which is a statute
25 here in New York and burglary in the fourth

1 degree a class E felony here in New York, your
2 Honor.

3 I would also like to point out that the
4 defendant pleaded guilty on January 18, 1994. He
5 was sentenced to a two day sentence and time
6 served under New York Penal Law Section 70.06,
7 subdivision 1 (B) which talks about and addresses
8 whether the defendant can be considered a second
9 felony offender under paragraph 4. It says
10 sentence must have been imposed not more than ten
11 years before the commission of the felony for
12 which the defendant presently stands convicted.
13 Here the defendant presently stands convicted of
14 course of conduct against a child in the second
15 degree and the commission of that felony occurred
16 from January 3rd, 1999 to December 21, 2000 which
17 is within a 10 year period from the times he was
18 convicted in 1994 in the Florida crimes, so for
19 those reasons he should be considered a second
20 felony offender.

21 THE COURT: And essentially it's all
22 boiling down to I should find him a second felony
23 offender because of a conversation you had with a
24 clerk in an office that I imagine the clerk,
25 un-named, whose title you don't recall, but

1 certainly it's your recollection that they told
2 you that what he had pled to amounts to a
3 violation of 812.014 and 810.02.

4 MS. MALIK: Your Honor, my office has
5 worked very hard in trying to get in touch with
6 the Florida County clerk's office and trying to
7 get all of this information together. I'm
8 presenting the Court with the information we have
9 from the Miami Dade clerk's office.

10 THE COURT: I understand exactly what
11 you're saying.

12 MS. MALIK: I am telling you as an
13 officer of the Court that when I spoke to the
14 county clerk down there in Miami Dade County they
15 tell me that he was convicted of grand theft
16 motor vehicle and burglary under the statute I
17 just gave to you.

18 THE COURT: Miss Malik, I heard what
19 you said both times and in fact what I had done
20 most recently is just summarized what it is you
21 had said.

22 THE COURT: And Mr. Viruet, does your
23 client still oppose to a predicate felony
24 statement being filed against the defendant?

25 MR. VIRUET: Yes, absolutely, your

1 Honor.

2 THE COURT: Based on the record in this
3 hearing and the late filing of the memos that are
4 being relied upon by the People, and the Court
5 being unsatisfied with information being relayed
6 to the assistant by un-named and untitled clerks
7 in Florida, and the People not having any
8 information as to what the underlying facts of
9 this offense were, their belief it was a business
10 not any firm knowledge that it was a business
11 involved, the People have not met their burden of
12 proving that the defendant has been convicted of
13 a prior felony, so the application by the People
14 to have the defendant declared to be a predicate
15 is denied.

16 This matter is now being moved to
17 sentence. Miss Malik?

18 MS. MALIK: Yes, your Honor. I would
19 also just like to point out to the Court on the
20 last court date I handed up a certified copy from
21 the circuit and county clerks in and for Miami
22 Dade, Florida which states that the defendant was
23 arrested on December 16, 1993. The charges were
24 grand theft, motor vehicle and burglary,
25 unoccupied. Adjudication was held and sentence

1 was January 19, 1994.

2 THE COURT: Okay.

3 MS. MALIK: And the Court has a copy of
4 that.

5 THE COURT: Is this matter being moved
6 to sentence?

7 MS. MALIK: Yes, your Honor.

8 THE COURT: Do you wish to say anything
9 prior to sentence being imposed?

10 MS. MALIK: I'm sorry, your Honor?

11 THE COURT: Do you wish to say anything
12 prior to sentence being imposed?

13 MS. MALIK: Absolutely, your Honor. I
14 would like to say this case was a case of
15 betrayal, manipulation and abuse that the
16 defendant in this case used his power and control
17 over Ashley and sexually violated her for years in
18 the sanctity of defendant's home. The defendant
19 used her as a sex toy for approximately seven
20 years, started slowly at the age of 5 with the
21 touching of her breasts and vagina with her being
22 made to touch his penis, and it escalated into
23 him raping her from the period of when she was
24 nine years old to 12 years old. I note one charge
25 here constituted rape in the first degree that

1 happened here in Queens County but the defendant
2 was bold and he was brazen with his actions and,
3 again, this all happened in the sanctity of their
4 own home with other people asleep in the middle
5 of the night in her grandmother's house here in
6 Queens. But what's most tragic is the
7 complainant here lost her innocence of youth
8 because of the defendant who was entrusted to
9 take care of her, protect her and provide for
10 her, who the complainant referred to him as daddy
11 and her father because he was the only father she
12 had ever known her entire life. And instead of
13 now having fond memories of being daddy's little
14 princess Ashley is going to have to live through
15 the horrific experience and memories of being
16 raped by her father at the age of 12 which will
17 probably compromise any relationship she will
18 ever have with a man.

19 I would ask this Court to please
20 sentence this defendant towards the upper 25 year
21 maximum and hold him responsible which he was
22 obviously unable to do for the rape and
23 molestation of Ashley Martinez.

24 I do have Ashley Martinez in the
25 courtroom, your Honor, who would like to address

1 the Court.

2 THE COURT: Yes. Please have her
3 stand.

4 MS. MARTINEZ: I have a letter
5 addressed to Jimmy. Out of all the people I've
6 met in my 15 years of life you effected me the
7 most. You've ruined my life beyond recognition.

8 I was nothing but a baby when you
9 decided to take advantage of me. I trusted you.
10 You took my youth and vulnerability for granted.
11 I guess life for us was too good to be true. You
12 were like no one I've ever met. You took care of
13 us in that little bit of time when I actually
14 respected you. You treated me and my family like
15 we meant everything in the world to you. No one
16 would have suspected a thing. You are one off
17 the best con artists in the world and you
18 brainwashed everyone into thinking you were the
19 perfect person.

20 If your goal in life was to make a
21 person suffer then you've succeeded. I can't sit
22 here and say I know what you've gone through in
23 you life but I can tell you what I've gone
24 through in mine, sleepless nights. Those are the
25 worst. I can be in the deepest of sleep and I'll

1 have dreams of you creeping into my bedroom at
2 night. I would wake up in cold sweats and not be
3 able to go back to sleep. The memories you've
4 left me with are way too vivid for me to imagine.
5 I go back to times when I would have to fake like
6 I was asleep just so you would leave me alone but
7 half the time you wouldn't. I ended up blocking
8 out half the time not wanting to think about what
9 you were doing to my body pain, the pain you've
10 caused is so severe. Sometimes I close my eyes
11 and your face just pops into my head. I can
12 sometimes still smell the alcohol and cigarettes
13 on your breath. Can you imagine living with
14 that? What about the fears? I'm afraid to trust
15 people. I push people away from me. I won't let
16 anybody get too close to me in fear of the fact
17 that I might get hurt. I'm afraid to sleep with
18 my door open or my lights on. I'm afraid to be
19 left alone. You've left scars on my body, not
20 physically but emotionally and mentally. I was
21 afraid of you. I fronted for you and other
22 people that everything was okay. If I can go
23 back I would have screamed it for the whole world
24 to hear. You used to tell me things like I'm
25 only trying to make you a woman and nobody's

1 going to believe you if you tell. I can say now
2 that everything you've done to me didn't make me
3 weaker but it made me stronger. All those years
4 I held this in and it only made me mad at the
5 world. And I finally couldn't take it any more.

6 I'm proud to say I have the best family
7 in the world. That have stood behind me 100
8 percent. You were wrong. I should have never
9 fed into all that foolishness you said.

10 I hope you can sleep at night knowing
11 the kind of person you are. All the things I've
12 just said hasn't affected you one bit but I
13 forgive you. I don't like you. As a matter of
14 fact I hate you but I forgive you. But just
15 remember that I'm not the one you need
16 forgiveness from. When judgment day comes that's
17 when you need to ask God to beg for your
18 forgiveness. Thank you.

19 THE COURT: Thank you.

20 Anything further, Miss Malik?

21 MS. MALIK: Your Honor, I would just
22 like to point out that one of the interns just
23 brought from the Federal Express US Airbill
24 showing the defense was served overnight Federal
25 Express on July 20th.

1 THE COURT: To defense counsel, do you
2 or your client wish to say anything prior to
3 sentence?

4 MR. VIRUET: Yes, your Honor. May it
5 please the Court, I would just like to address
6 just a couple of comments the District Attorney
7 made.

8 She started out with the issue that
9 this is a most tragic incident and it has
10 effected the victim's life. And I will say to
11 the Court that it is a crime and a tragic thing
12 for anybody to abuse any other person. That's on
13 the record. However, we must remember that while
14 the trial was in process and as of the date of
15 the trial the victim upon information and belief
16 still was a virgin. It was brought out from
17 testimony that there was repetit ovula villa
18 impact 500 times and that in and of itself will
19 definitely rupture a hymen, I submit to the
20 Court, any hymen of any person, and that wasn't
21 the case here so she's still a virgin. Okay. So
22 the fact the defendant made a statement I submit
23 to the Court was inflammatory.

24 Now I will deal with the issue of the
25 sentence. The defendant has submitted and I wish

1 to submit to the Court some letters of references
2 and recommendations, I would like to submit to the
3 Court to review and to mitigate the sentence in
4 this case because the District Attorney last time
5 actually submitted a predicate felony statement
6 at the very last moment. I was not able to bring
7 to the Court the witnesses I had produced the
8 last time, which is the defendant's sister who
9 appeared everyday of the trial, as well as her
10 husband, Mr. Tom Delaney, the defendant's sister
11 is Michele who is married to Mr. Tom Delaney, but
12 they had to go back to Florida and they don't
13 have the kind of money to be able to come back
14 and offer the Court some statement as to the
15 defendant's good side in an attempt to get the
16 Court to consider mitigation of sentence in this
17 particular case.

18 I do have, however, two persons present
19 in court; one of them is a very close friend of
20 the defendant, he worked with him. His name is
21 Tom Palpadakis (phonetic) who worked with him for
22 a period of seven years. He's willing to address
23 the Court. I also have another colleague and
24 friend of the defendant who is a friend of his for
25 the past 14 years, Miss Nestra Harry. (phonetic)

1 She is in the audience. She would like to
2 address the Court momentarily. Then I would like
3 to go ahead with my presentation.

4 THE COURT: Let me just, for the
5 record, indicate I received from you a copy of
6 the defendant's certificate of release or
7 discharge from active duty. There's a letter
8 from Walter Woseiola, (phonetic) Tom Palpadakis,
9 (phonetic) Nestra Harry, Tom Delaney, Rachel
10 Acevedo, (phonetic) Stacy Towari, (phonetic).
11 There's a younger Acevedo and Jim Miller,
12 (phonetic) Ible Khan. (phonetic)

13 MR. VIRUET: The last name is the
14 defendant's mother, your Honor.

15 THE COURT: Is the defendant's mother.
16 So all of these are from the point of view of
17 each of the writers attesting to their good
18 association with the defendant surprised at the
19 jury's verdict and want me to understand that
20 he's a good man and that I should grant him
21 leniency in my sentence.

22 MR. VIRUET: That is correct.

23 THE COURT: Is there anything beyond
24 this? Sir, would you want this included with the
25 Court record?

1 MR. VIRUET: Yes, I would like the
2 Court to include that in consideration of
3 sentence.

4 THE COURT: Anything else?

5 MR. VIRUET: I would like to state for
6 the Court if the Court -- in lieu of the
7 statements by the persons whom I produced to
8 speak to consider the defendant's good behavior
9 and status as a good citizen in pronouncing
10 sentence.

11 The defendant first came to United
12 States approximately --

13 THE COURT: Miss Malik, have a seat.

14 MR. VIRUET: Back in around 1988 -- '86
15 and he's been coming from New York to Florida
16 back and forth. He joined the US Marine Corp.
17 and there was an issue that had been brought up
18 partially during the trial. The District
19 Attorney had stated that the defendant had in
20 fact been discharged dishonorably. I wanted to
21 show to the Court this is a D.D. 214 form which
22 indicates he was honorably discharged. He was a
23 motor vehicle driver. He got out. He was able
24 to obtain employment eventually with Phoenix
25 Refrigeration where he worked for approximately

1 14 years. At that time he was a very good
2 person. He was married. He had four children.
3 He supported all his children throughout the time
4 and has in fact been as noted on some of the
5 letters that I presented been a very, very good
6 employee. The president of Phoenix would in fact
7 rehire him should the opportunity comes when he
8 gets released to re-employ the defendant.

9 I think overall the fact that the
10 jury's verdict is final, the determination of the
11 jury, the fact is that it is up to the Court now
12 to be able to in its own discretion to adjudicate
13 this person and sentence him equitably.

14 I believe the charge of rape at the
15 minimum base carries a minimum of five years
16 incarceration. The course of conduct which is a
17 D felony carries a minimum of two. The
18 misdemeanor, I believe he served. He's been in
19 jail for over a year.

20 I submit to the Court to please take
21 into consideration in your own discretion the
22 fact that really this is the first time that he's
23 been at least tried on this particular charge and
24 to sentence the defendant in its discretion to a
25 minimum of two years on the D felony and five

1 years on the rape case with the rape conviction
2 to run concurrent as I believe that both the
3 course of conduct and the rape both mitigate into
4 one situation, if it please the Court, which is
5 ultimately the rape conviction.

6 I will submit to the Court the Court
7 will be doing justice by incarcerating the
8 defendant to the five years, two years on the
9 course of conduct to run concurrent.

10 And I will remind the Court he has had
11 a hearing scheduled Friday on a governor's
12 warrant and I would like for the defendant to
13 ultimately be extradicted in response to that.
14 Thank you, your Honor.

15 THE COURT: Would your client wish to
16 say anything prior to sentence being imposed?

17 MR. VIRUET: Thank you, your Honor. He
18 has no statement, your Honor.

19 THE COURT: This is a trial that I
20 presided over and so I had an intimate chance to
21 on my own listen to the victim in this case
22 realizing her youth, realizing the challenge that
23 there is for anyone who's been victimized, as the
24 jury has found she has been, as I also believe
25 she has been.

1 It's very difficult for any victim
2 given the age she is and the age she was at the
3 time this abuse began to stand up in a court of
4 law before strangers and to relay the story in
5 the only way the victim can so it is tantamount
6 to her strength that she's admitted to having
7 gained through this process. It is tantamount to
8 her strength that she was able to come here and
9 to tell us what's been happening to her over the
10 course of these years. It's also thinking back
11 to the testimony of the victim and the initial
12 resistance that she had to even tell her mother
13 and the people closest to her about the things
14 that this defendant had been doing to her, this
15 defendant who had been in a position of trust who
16 had for all intense and purposes moved into the
17 role of her father should have been that male
18 figure in her life that would provide the kind of
19 support and kind of confidence that a daughter
20 would gain from a trustworthy hard-working loving
21 man in the house. That is the type of person
22 that she wanted from you, Mr. Khan, to be and you
23 became maybe the biggest failure.

24 The sentence I could give would not
25 restore the trust the victim had every reason to

1 believe she could place in you. It is a
2 violation of that trust that to me given the
3 nature of these charges are in many ways as
4 severe as the acts themselves. Not only had the
5 victim grown to trust you in the role of father
6 but her mother also expected that you would act
7 in a role relative to her daughter, relative to
8 her children, to act in a role that you had let
9 them to believe that you would be, meaning a man
10 in the house that not only works hard and makes a
11 living for the family but protects her, the
12 mother and the kids in that family, from any
13 harm. That harm they had every reason to expect
14 you would protect them from would not only be the
15 harm that could come to them from outside the
16 home but more much more insidiously the kind of
17 harm that could come from inside the home, and
18 you had failed in that role and you had caused
19 her immeasurable harm. And only because of the
20 strength that she has shown here I think she'll
21 survive it, become a bigger asset to her brothers
22 and sister and family. And it's my expectation
23 that she will recover as fully a child can from
24 this kind of abuse.

25 With that said, what you had done, sir,

1 is one of the most harmful things that a parent
2 or father figure you are or an adult male can do
3 to a child.

4 You had been found guilty of this by
5 this jury of rape, of sex abuse of a course of
6 sexual conduct against a child and acting in a
7 manner injurious to the health of the child; and
8 for those crimes, sir, the top count being a B
9 violent felony offense, you are hereby sentenced
10 to a determinate sentence of 14 years; for the C
11 violent felony you are sentenced to a determinate
12 sentence of ten years; for the D violent felony
13 offense you are sentenced to five years; and for
14 the A misdemeanor one year. Each of those
15 sentences are to run concurrent with each other.

16 After that sentence you have to -- you
17 will be on five years post-release supervision.
18 You have to pay a \$1,000 fine. You have to pay a
19 \$270 mandatory surcharge and crime victims
20 assistance fee. You also have to pay a \$50 sex
21 offender registration fee and finally another \$50
22 DNA fee. So that's a total of \$1370 to be taken
23 out of inmate funds or certainly any other form.
24 You have to pay that assessment.

25 Anything further prior to sentence

1 being executed?

2 MR. VIRUET: Nothing further.

3 MS. MALIK: I ask that an order of
4 protection be issued, your Honor, in favor of --
5 Ashley Martinez.

6 I also would like to note for the
7 record Mr. Viruet did not serve me with the
8 sentencing letters he has provided to the Court.
9 I have no knowledge of them, nor have I seen
10 them. And I believe he's supposed to serve them
11 on the People within 10 days before sentencing.

12 THE COURT: Does Al have the order of
13 protection?

14 MS. MALIK: Your Honor, I showed the
15 Federal Express Airbill overnight delivery to
16 your Honor and to defense counsel, could I have
17 it back, please?

18 THE COURT: Sure.

19 COURT CLERK: For the record, defendant
20 is being handed a copy of his notice of right to
21 appeal (Handing)

22 * * *

23 CERTIFIED THAT THE FOREGOING IS A TRUE
24 AND ACCURATE TRANSCRIPT OF THE ORIGINAL
STENOGRAPHIC MINUTES IN THIS CASE

25 MINDY S. ELGARTEN
Senior Court Reporter